Office - Supreme Court, U.S.
FILED
NOV 12 1983
ALEXANDER L. STEVAS,
CLERK

83-788

No. 83-_____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1983

IN RE STATE OF FLORIDA, Petitioner.

ON PETITON FOR WRIT OF MANDAMUS
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF MANDAMUS

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General
(Counsel of Record)

Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, Florida 32301
(904) 488-0290

QUESTION PRESENTED

Whether the Supreme Court of Florida misconstrued this Court's opinion in Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982), when on remand, that court ordered the trial court to enter a new sentence without ever affording the trial court an opportunity to evaluate the facts proved at trial in light of the correct status of the law as stated by this Court?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
PARTIES TO THIS PROCEEDING	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	13
CONCLUSION	19
CERTIFICATE OF SERVICE	20
APPENDIX	21

TABLE OF CITATIONS

CASE	PAGE
Bucolo v. Adkins, 424 U.S. 641 (1976)	16
Connor v. Coleman, 425 U.S. 675 (1976)	17
Deen v. Hickman, 358 U.S. 57 (1958)	17
Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982)	i, 1-8, 12,14, 17-20,
Enmund V. State, ____ So.2d ____ (Fla. 1983)	13
Enmund v. State, 399 So.2d 1362 (Fla. 1981)	2,4,5, 11,12, 14,19
Estelle v. Jurek, 450 U.S. 1014, 68 L.Ed.2d 214 (1981)	18
Fiske v. Kansas, 274 U.S. 380 (1927)	16
Lockett v. Ohio, 438 U.S. 586 (1978)	12
Proffit v. Florida, 428 U.S. 424 (1976)	18

Stein v. New York,
346 U.S. 156 (1953) 17

OTHER CITATIONS

28 U.S.C. §1651 2

PARTIES TO THIS PROCEEDING

The State of Florida seeks a writ of mandamus directed to the Supreme Court of Florida whose members are as follows:

James E. Alderman, Chief Justice
James C. Adkins, Jr., Justice
Joseph A. Boyd, Jr., Justice
Ben F. Overton, Justice
Parker Lee McDonald, Justice
Raymond Ehrlich, Justice
Leander J. Shaw, Jr., Justice

Earl Enmund was the Petitioner in the case decided by this Court and subsequently remanded to the Supreme Court of Florida, which entered an Order which the State of Florida now contends was contrary to the meaning of this Court's opinion.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. _____

IN RE STATE OF FLORIDA

PETITION FOR A WRIT OF MANDAMUS
TO THE SUPREME COURT OF FLORIDA

The State of Florida, through its Attorney General, petitions this Court for a writ of mandamus to direct the Supreme Court of Florida to comply with the Court's opinion in Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982).

OPINIONS BELOW

The Florida Supreme Court's original opinion in this case is reported as Enmund v. State, 399 So.2d 1362 (Fla. 1981). This Court's opinion is reported as Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982). The Florida Supreme Court's opinion on remand has not yet been reported. A copy of that opinion can be found in the appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1651. The Court's opinion was rendered on July 2, 1982. The Florida Supreme Court's Order on remand was rendered on October 20, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional or statutory provisions relevant to this proceeding.

STATEMENT OF THE CASE

The proceedings in the Supreme Court of Florida which caused the State of Florida to seek a writ of mandamus in this case occurred on remand from this Court's opinion in Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982). The Court had reversed the Florida Supreme Court because it had upheld Enmund's two death sentences despite "the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken...." The Court stated that "we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion." Enmund v. Florida, supra at 73 L.Ed.2d 1154.

In her dissent, Justice O'Connor specifically recognized that it was her understanding that the majority had

intended that a new sentencing hearing occur: "Apparently, the Court also intends that the case be remanded for a new death sentence hearing, consistent, of course, with its holding today." Enmund v. Florida, supra at 73 L.Ed.2d 1170, n. 43 (O'Connor, J., dissenting). However, on remand, the Florida Supreme Court merely directed that the case be remanded to the trial court for entry of two life sentences "in accordance with" this Court's opinion.

The facts pertinent to this mandamus proceeding revolve around Earl Enmund's presence or lack thereof at the scene of the murders and his state of mind at the time the murders occurred. The trial court specifically found in the judgment and sentence that Enmund, along with his co-defendant, "each fired into the bodies of Mr. and Mrs. Kersey." Enmund v. State, 399 So.2d 1362, 1372 (Fla. 1981). However,

while evaluating the sufficiency of the evidence to support the convictions, a majority of the Florida Supreme Court rejected this factual finding by the trial court, finding that at most Enmund was nearby in a getaway vehicle. See Enmund v. Florida, 73 L.Ed.2d 1144. The Florida Supreme Court then found that constitutionally it made no difference concerning the propriety of the death sentences whether Enmund was physically present at the scene of the murders or waiting nearby in the getaway vehicle. Specifically, the Florida Supreme Court stated that Enmund had offered "no binding legal authority that directly supports this proposition, and we therefore reject it." Enmund v. State, supra, at 399 So.2d 1371. Of course, this Court disagreed and held that a sentence of death was constitutionally impermissible "in the

absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken...." Enmund v. Florida, supra, at 73 L.Ed.2d 1154.

Significantly, the majority specifically noted that the Florida Supreme Court's understanding of the evidence differed sharply from the trial court's concerning the degree of Enmund's participation in the crimes. However, the Court went on to comment that the factual "question is irrelevant to the constitutional issue before us...." Id. at 73 L.Ed.2d 1145, n. 2.

Just prior to oral argument in Enmund v. Florida, counsel for Enmund filed a reply brief in which they quoted from documents which had been in front of the trial court but had not been formally made part of the state record on appeal. The

State of Florida filed a Motion to Strike Portions of Petitioner's Reply Brief on the ground that Enmund had quoted from documents which tended to demonstrate his lack of involvement in the crime when, in fact, these documents had never been seen by the Florida Supreme Court, and, in fact, were refuted by other documents which were also present before the trial court but not formally made part of the record on appeal and not ever seen by the Florida Supreme Court. This motion was denied, presumably because this Court's focus was only upon the constitutional issue rather than the factual issue. See Enmund v. Florida, supra at 73 L.Ed.2d 1145, n. 2.

At oral argument, counsel for the State of Florida pointed out that the Florida Supreme Court's factual determination that Earl Enmund was not present at the farmhouse was wrong in light of the

record. See transcript of oral argument in Enmund v. Florida at 43. However, this factual mistake was not emphasized because it was irrelevant to the State's position on the constitutional issue. The Court subsequently agreed. Enmund v. Florida, 73 L.Ed.2d 1145, n.2.

The State of Florida submits that there is and has always been competent evidence in the record to support the trial court's factual finding that Enmund was present and participating during the murders and robberies. For example, as was explained to the Court, the person seen in the getaway vehicle had long hair and could not have been Enmund because, as was evident to both the trial court and the jury (but not the Florida Supreme Court), Enmund was totally bald. See transcript of oral argument in Enmund v. Florida at 43-45. Since there was evidence in the record that Enmund was

identified by name as having been in the getaway vehicle on the way to the scene of the crime and again returning from the scene of the crime, the only logical inference was that that had been found by the trial court, i.e., that Enmund was in fact present and participating at the scene of the murders.[1]

In addition to the incriminating statements which were filed before the trial court and not available to the Florida Supreme Court, and in addition to

---

[1]At trial, the prosecutor had several reasons for not emphasizing that Earl Enmund had left the getaway vehicle. First, it made no difference under the law in existence at the time concerning the penalty since a principal's accessorial liability was identical to that of the actual perpetrator. Second, and more importantly, it would have impeached the State's witness, Ida Jean Shaw, who for some reason steadfastly refused to admit she was in the car although she freely admitted all other aspects of her involvement in the criminal episode.

the fact that Enmund could not have been in the getaway vehicle during the actual murders, there is other evidence in the record to support the trial court's factual finding that Enmund was an active participant. In the judgment and sentence, the trial court specifically referred to his knowledge of the case which had been obtained from his having been the trial judge in the case of Jeanette Armstrong, who had been a co-defendant and who had been present at the murder scene. Implicit in this reference to facts gleaned from the co-defendant's trial was the fact that since the trial court was aware that both murder victims were large people and extremely heavy, he properly inferred that it had taken more than one person to move and align the bodies. Since Jeanette Armstrong was unconscious because she had been shot by one of the victims, the only

logical inference was that Earl Enmund assisted Sampson Armstrong at the farmhouse where the murders occurred. Indeed, this is the substance of one of Jeanette Armstrong's statements which was available to the trial court but not the Florida Supreme Court. See Enmund v. State, supra, 399 So.2d 1372. Also, the trial court relied upon the fact that the victims were shot in the prone position and that two different weapons were used to commit the murders. Id.

None of these crucial factual distinctions were pointed out or emphasized by the State of Florida during the direct appeal to the Supreme Court of Florida. This was because the State's position, which was supported by all law in existence at that time, was that constitutionally it made no difference whether a participant in a felony murder intended that death would

occur as a result of the underlying felony. See, e.g., Lockett v. Ohio, 438 U.S. 586, 614, n. 2 (1978) (Blackmun, J., concurring). In other words, Enmund's degree of participation and intent did not become relevant to the limited, specific claim alleged in the Supreme Court of Florida until this Court said that it did in Enmund v. Florida after the claim had been expanded to include lack of culpability and knowledge.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Supreme Court of Florida apparently interpreted this Court's opinion to mandate that Enmund's death sentences be vacated and life sentences imposed. The Supreme Court of Florida reached this conclusion without the benefit of briefing or oral argument. Although the State of Florida filed a Motion to Remand for Evidentiary Hearing, there is no indication in the Florida Supreme Court's opinion that this motion was considered. The lower court stated that the sentences must be reduced to life imprisonment "[i]n accordance with the Supreme Court's decision...." Enmund v. State, ____ So.2d ____ (Fla. 1983) (A-1).

Thus, the Supreme Court of Florida interpreted this Court's opinion to mean that Enmund's death sentences must be reduced to life imprisonment even though the sentencing authority never had an

opportunity to evaluate Enmund's true degree of involvement in the crimes in accordance with the correct status of the law as ordained by this Court. It is significant that Enmund's claim in the Supreme Court of Florida was only that a death sentence was inappropriate absent proof of his intent to take life, Enmund v. State, supra at 399 So.2d 1371, while the claim in this Court was transformed to death is inappropriate "for one who neither took life, attempted to take life, nor intended to take life." Enmund v. Florida, supra at 73 L.Ed.2d 1145. It is also significant to note that this Court was fully aware of the factual dispute in Enmund's case. The majority specifically noted that there was disagreement between the trial court's findings and the Florida Supreme Court's conclusions, but the majority found that the question was

"irrelevant to the constitutional issue...." Id. at 73 L.Ed.2d 1145, n. 2. The State of Florida submits that now that the constitutional issue has been resolved in Enmund's favor, the factual dispute is no longer irrelevant. Support for the State's position can be found in Justice O'Connor's dissent where she commented that both the majority and the dissent apparently agreed that a new sentencing hearing was appropriate now that the constitutional issue had been resolved. Id. at 73 L.Ed.2d 1170, n. 43 (O'Connor, J., dissenting).

It should also be noted that while this Court is normally bound by a state court's factual determinations, the Court is free to disregard state court factual determinations when a federal right and a finding of fact are so intermingled as to make it necessary to do so in order to pass

upon the federal question. Fiske v. Kansas, 274 U.S. 380, 385-386 (1927). In other words, the Court's opinion cannot be construed as an implicit affirmance of the Florida Supreme Court's factual conclusions.

The State of Florida fully recognizes that mandamus is an extraordinary proceeding which is not favored. However, the Court has previously held that mandamus is appropriate to cause a lower court to comply with the intent of an opinion issued by the Court. See, e.g., Bucolo v. Adkins, 424 U.S. 641 (1976). In that case, the Court summarily reversed the Florida Supreme Court and cited two controlling cases. The Florida Supreme Court then remanded the case to the trial court for further proceedings even though the issue had already been fully resolved against the State of Florida. Although Bucolo v.

Adkins involved a situation in which the lower court remanded when it had no authority or reason to do so, the Court explained that mandamus was appropriate when a lower court "has attributed to this Court a decision which it never made." Id. at 424 U.S. 643. See also, Connor v. Coleman, 425 U.S. 675 (1976); Deen v. Hickman, 358 U.S. 57 (1958). The State of Florida submits that is precisely the situation in this case.

Since the issue involves the intent behind this Court's opinion in Enmund v. Florida, supra, the State of Florida is unable to seek relief from any other court. It has previously been held that the people are entitled to due process, Stein v. New York, 346 U.S. 156, 197 (1953), and due process in this case should at least involve affording the sentencing authority an opportunity to explain his factual

conclusions in terms of correct constitutional law. If this Court remands and the State of Florida is unable to prove at a new sentencing hearing that Enmund took life, attempted to take life, or intended to take life, Enmund v. Florida, 73 L.Ed.2d at 1145, that will be the appropriate time for the Florida Supreme Court to direct that life sentences be imposed. The State of Florida respectfully urges the Court not to be swayed by the fact that this case involves a potential death sentence. See, e.g., Estelle v. Jurek, 450 U.S. 1014, 68 L.Ed.2d 214, 216 (1981) (Rehnquist, J., dissenting). Florida's capital punishment law has been expressly upheld, Proffit v. Florida, 428 U.S. 424 (1976), and justice should not be thwarted simply because the Florida Supreme Court made an incorrect factual conclusion which was irrelevant at the time but which is now critical.

CONCLUSION

The State of Florida respectfully requests that a writ of mandamus issue from the Court directed to the Supreme Court of Florida to show cause why its opinion on remand in Enmund v. State should not be vacated and the case remanded for a new sentencing hearing in accordance with the Court's opinion in Enmund v. Florida. The State of Florida also requests such additional relief as may be deemed appropriate.

Respectfully Submitted,

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1502
Tallahassee, Florida 32301
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that seven (7) copies of the foregoing Petition for Writ of Mandamus have been provided by hand delivery to Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that three (3) copies of the Petition for Writ of Mandamus have been provided by United States Mail to William C. McLain, Assistant Public Defender, Hall of Justice Annex, 495 N. Carpenter Street, Bartow, Florida 33830, Attorney of Record for Earl Enmund, this _____ day of November, 1983.

LAWRENCE A. KADEN
Of Counsel

APPENDIX

SUPREME COURT OF FLORIDA

NO. 48,525

EARL ENMUND, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[October 20, 1983]

PER CURIAM.

This case is before us on remand from the United States Supreme Court following its decision on certiorari review of our earlier judgment in this case, reported as Enmund v. State, 399 So.2d 1362 (Fla. 1981). The Supreme Court reversed our judgment insofar as it affirmed appellant's sentences of death for two convictions of felony murder. Enmund v. Florida, 102 S.Ct. 3368 (1982). In accordance with the Supreme Court's decision, therefore, we vacate appellant's sentences of death.

This case is remanded to the circuit court with directions to impose, for each of the two first-degree murder convictions, a sentence of life imprisonment without eligibility for parole for twenty-five years. §§ 782.04(1), 775.092(1), & 921.141, Fla. Stat. (1975). The sentencing court shall have the discretion to decide whether the two sentences of life imprisonment are to be served concurrently or consecutively.

It is so ordered:

ALDERMAN, C. J., ADKINS, BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur

An Appeal from the Circuit Court in and for Hardee County,

William A. Norris, Jr., Judge - Nos. 75-122 and 75-123

Jerry Hill, Public Defender and W. C. McLain, Assistant Public Defender, Chief, Appellate Division, Tenth Judicial Circuit, Bartow, Florida; and James S. Liebman, New York, New York,

for Appellant

Jim Smith, Attorney General; George R. Georgieff, Director, Criminal Division and Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Office - Supreme Court, U.S.
FILED
DEC 6 1983
ALEXANDER L. STEVAS,
CLERK

Case No. 83-788

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE STATE OF FLORIDA,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-1184 or 533-0931

COUNSEL FOR RESPONDENT,
EARL ENMUND

TABLE OF CONTENTS

	PAGE NO.
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	1
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

CASES CITED:	PAGE NO.
Bucolo v. Adkins 424 U.S. 641 (1976)	4
Bullington v. Missouri 451 U.S. 430 (1981)	4
Burks v. United States 437 U.S. 1 (1978)	4
Enmund v. Florida __U.S.__, 73 L.Ed.2d 1140 (1982)	1,3,4
Enmund v. State 399 So.2d 1362 (Fla.1981)	1,2,3
Enmund v. State __So.2d__ (Fla.1983)	1
Fiske v. Kansas 274 U.S. 380 (1927)	3
State v. Dixon 283 So.2d 1 (Fla.1973)	2
OTHER AUTHORITIES:	
§921.141, Fla.Stat. (1975)	2

STATEMENT OF THE CASE

Respondent, Earl Enmund, contends that the only facts relevant to this proceeding are those which have been carefully analized and presented in this Court's opinion in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982). He urges this Court to rely upon those for a determination of the issues in the Petition for Writ of Mandamus.

On pages 4 through 12 of the Petition for Writ of Mandamus, Petitioner contends that certain disputed evidence or differing inferences from the evidence is now relevant to establish the degree of Enmund's participation in the crime and his intent. These factual matters were litigated in the state trial court and the Supreme Court of Florida where the disputes were ultimately resolved. Enmund v. State, 399 So.2d 1362 (Fla. 1981). Consequently, the facts and inferences Petitioner discusses on those pages are irrelevant to these proceedings and should be disregarded.

REASONS FOR DENYING THE WRIT

THE SUPREME COURT OF FLORIDA CORRECTLY CONSTRUED AND APPLIED THE OPINION OF THIS COURT IN ENMUND v. FLORIDA.

Petitioner asserts that the Supreme Court of Florida misconstrued and misapplied this Court's opinion in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982). On remand, the Florida court directed the state trial court to vacate Respondent Enmund's death sentences and to impose life sentences. Enmund v. State, __So.2d__ (Fla.1983)(opinion reprinted in the Appendix to Petition for Writ of Mandamus). However, Petitioner claims that this Court's decision did not mandate life sentences for Enmund and that Petitioner is entitled to a new sentencing hearing in the trial court in order to have a second chance to prove that Respondent Enmund took life, attempted to take life or intended that life be taken. Petitioner's position is without

merit. The Supreme Court of Florida's action on remand was a correct application of this Court's opinion.

There are several reasons why Petitioner's claim of entitlement to a new evidentiary sentencing hearing is unfounded. First, Enmund's involvement was fully litigated in the state trial court. The degree of his participation was critical to the question of his guilt or innocence as evidenced by the Supreme Court of Florida's analysis. Enmund v. State, 399 So.2d 1362 (Fla.1981). Additionally, Florida law required litigation of the degree of Enmund's participation for purposes of sentencing. §921.141, Fla.Stat. (1975); State v. Dixon, 283 So.2d 1 (Fla.1973).

A second reason is that the factual issue of the degree of Enmund's involvement was necessarily determined in deciding the issues initially raised in the Supreme Court of Florida. Enmund v. State, 399 So.2d 1362 (Fla.1981). That court concluded:

> There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J.B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kersey's money.

Ibid., at 1370. In making the above conclusions, the Supreme Court of Florida rejected a portion of the trial court's findings of fact which had concluded that Enmund's involvement was greater because the trial court had based its finding on an impermissible inference. Ibid. Petitioner's dissatisfaction with the Supreme Court of Florida's resolution of this factual matter is the true gravamen of Petitioner's current claim.

The last reason is that Petitioner has consistently maintained that Enmund's degree of participation in the crime was a relevant issue for the jury, the trial court and this

Court to consider in determining the appropriate sentence.[1/] This negates Petitioner's current assertion that it has only now discovered that Enmund's mental state, physical proximity to the scene and other actions were relevant to sentencing. These factual issues have always been relevant in this case and Petitioner has aggressively litigated these matters.

This Court acknowledged the disagreement between the trial court and the Supreme Court of Florida over the evidence of Enmund's participation. Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140,1145 f.n. 2 (1982). However, this Court also recognized that the factual dispute did not have to be resolved by this Court in order to decide the federal constitutional question. Ibid. Consequently, following long standing practice, the Supreme Court of Florida's factual conclusions were accepted Fiske v. Kansas, 274 U.S. 380,385-386 (1927). and the constitutional question was decided on that basis. The direction to the Florida Court stated:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140,1154 (1982). The Florida Supreme Court, having already resolved the factual disputes in this case and noting that this Court accepted its factual conclusions for purposes of deciding the constitutional question, quite correctly determined that death sentences could

---

1/ E.g., Appellee's Supplemental Brief in Enmund v. State, 399 So.2d 1362 (Fla.1981), at 3-13; Brief for Respondent State of Florida in Opposition to Petition for Writ of Certiorari in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982), at 13; Brief for Respondent in Enmund v. Florida, supra, at 32-33,44-46,65-67 (E.g.: "Florida's death penalty statute require[s] consideration...[of] the extent of a defendant's participation... in the capital felony").

no longer be imposed on Enmund. Indeed, under these circumstances, a remand for another evidentiary sentencing hearing would have violated this Court's mandate.[2/] See, Bucolo v. Adkins, 424 U.S. 641 (1976).

The Supreme Court of Florida has faithfully followed the directions of this Court. There has been complete compliance with the mandate. No justification exists for the issuance of a writ of mandamus.

[2/] The evidentiary sentencing hearing Petitioner desires would also violate the Fifth and Fourteenth Amendments' proscription against placing a criminal defendant in jeopardy a second time, where there was "a failure of proof"--or, as held in this case an "absence of proof," Enmund v. Florida, __ U.S. __, 73 L.Ed.2d 1140,1145 (1982)--the first time. Burks v. United States, 437 U.S. 1,16 (1978), see, Bullington v. Missouri, 451 U.S. 430,442-443 (1981).

CONCLUSION

Upon the foregoing reasons, Respondent Enmund asks this Court to deny the petition for writ of mandamus.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

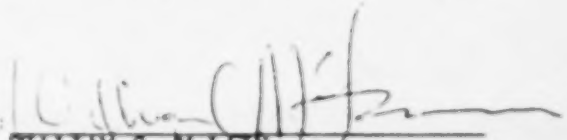
Member Of The Bar Of The United States Supreme Court

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for EARL ENMUND, the Respondent, hereby certify that on December 5, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief in Opposition to Petition for Writ of Mandamus on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida 32301.

On the Supreme Court of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Sid J. White, Clerk of Supreme Court, Supreme Court Building, Tallahassee, Florida 32304.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

JAN 3 6 1983
ORIGINAL COPY
MOTION FILED
DEC 6 1983

Case No. 83-788

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE STATE OF FLORIDA,

Petitioner.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Earl Enmund, asks leave to file the attached Brief In Opposition To Petition For Writ Of Mandamus without payment of the costs and to proceed in forma pauperis pursuant to Rule 46. In support of this motion, Respondent states:

1. That he was convicted of first degree murder and robbery in the Circuit Court for Hardee County, Florida.

2. That he received a sentence of death for first degree murder.

3. That he appealed to the Supreme Court of Florida, and that Court affirmed his convictions and sentences.

4. That this Court, on writ of certiorari, reversed the decision of the Supreme Court of Florida affirming his death sentences. Enmund v. Florida, Case No. 81-5321.

5. That on remand, the Supreme Court of Florida directed that his death sentences be vacated and that life sentences be imposed.

6. That the present Petition for Writ of Mandamus filed by the State of Florida is contending that the Supreme Court of Florida did not properly comply with this Court's mandate.

7. That he has been adjudged insolvent and represented throughout his state court appeals by appointed counsel.

8. That he was allowed to proceed in forma pauperis on his Petition for Writ of Certiorari in Enmund v. Florida, Case No. 81-5321.

9. That his financial circumstances has not changed, and his affidavit of insolvency is attached to this motion.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR RESPONDENT,
EARL ENMUND

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

_____

_____

IN RE STATE OF FLORIDA, PETITIONER.

_____

_____

AFFIDAVIT IN SUPPORT OF RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

I, EARL ENMUND, being first duly sworn, depose and say that I am the Respondent in the above-styled case; that in support of my motion to proceed on my Brief in Opposition to Petition for Writ of Mandamus without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes____ No x

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer._____

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1975 - self-employed, fruit harvesting, $ [illegible] per month [illegible]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No__x__

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

_____

_____

3. Do you own any cash or checking or savings account? Yes____ No__x__

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No__x__

a. If the answer is yes, describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. _____

NONE _____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

_____
Respondent - EARL ENMUND

Subscribed and sworn to
before me this 30 day
of November 19 85.

_____
Notary Public

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for EARL ENMUND, the Respondent, hereby certify that on December 5, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis with attached Affidavit of Insolvency on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida 32301.

On the Supreme Court of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Sid J. White, Clerk of Supreme Court, Supreme Court Building, Tallahassee, Florida 32304.

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals